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Syarikat Bekalan Air Selangor Sdn Bhd v Kerajaan Negeri Selangor (Kerajaan Malaysia, third party)

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-1478–09 OF 2011
ABU BAKAR JAIS JC
13 FEBRUARY 2014

C

Civil Procedure — Amendment — Writ and statement of claim — Whether plaintiff locus standi to make application to amend — Whether plaintiff absolutely assigned its rights to sue to third party — Whether application not made honestly or with bona fides as fact of assignment not disclosed until very late in the D *day — Whether application, if allowed, would wholly change character of suit and cause prejudice to defendant which could not be compensated for with costs*

In the midst of trial of the instant suit, the plaintiff applied for leave to amend the writ and re-amend its amended statement of claim to add CIMB E Investment Bank Bhd ('CIMB') as a co-plaintiff on the ground the plaintiff had assigned its right to bring the instant action to CIMB either by way of charge or as an equitable assignment. The application was in response to the court having allowed the defendant to re-amend its defence to plead that the plaintiff was ab initio incompetent to have commenced the instant action as it F had absolutely assigned that right to CIMB. The defendant was allowed to re-amend its defence on the ground it never knew about the plaintiff's assignment to CIMB until the plaintiff's only witness at the trial disclosed that fact during cross-examination. In allowing that application, the court held that the plaintiff had failed to produce any evidence to show it had in any way G notified the defendant earlier of the assignment to CIMB. The plaintiff argued that its application should be allowed in the light of the defendant's challenge to its locus to initiate and maintain the action; that pursuant to O 15 r 6 of the Rules of Court 2012, the action could be saved if the joinder of CIMB was allowed; that the application was made bona fide without abusing the process H of the court; and that the court should only determine the nature of the assignment to CIMB at the end of the trial. In objecting to the application, the defendant contended that under the relevant assignment deed, the plaintiff's assignment to CIMB was described as 'absolute'; hence the plaintiff never had the right to commence the instant action and therefore had no right to make I the instant application to add CIMB as a co-plaintiff. The defendant said that because of the court's earlier finding that there was no evidence the defendant knew about the assignment prior to the testimony of the plaintiff's witness, the plaintiff was estopped from now contending otherwise. The defendant said the plaintiff's application was not bona fide, was an abuse of process of court and,

if allowed, would prejudice it in a manner which could not be compensated for by an award of costs.

Held, dismissing the application:

(1) The plaintiff was not in a position to legally make the application as it had absolutely assigned its rights to CIMB. Having viewed the plaintiff's affidavits in considering the surrounding circumstances, the factual matrix and the material available, the court could not find any evidence that the assignment was not absolute. This led the court inevitably back to the word 'absolutely' used in cl 3.1 of the assignment and charge II document which term was neither vague nor ambiguous. In the absence of other evidence, the court had no option but to rule that the plaintiff's assignment to CIMB was absolute (see paras 53 & 54).

(2) If the assignment was not absolute there would not be any need to add CIMB as a co-plaintiff. Had the assignment been by way of charge or if it was an equitable assignment, the plaintiff could very well stand alone in suing the defendant. It followed from the court's finding that the plaintiff could not file and be heard on the application to amend the writ or re-amend the statement of claim as the right to move the court was with CIMB which enjoyed the absolute assignment (see paras 55–57).

(3) The plaintiff's application was not made bona fide or honestly because it never disclosed the fact earlier that its rights had been assigned to CIMB until it was extremely late in the day ie only when the plaintiff's sole witness testified in court. Since the court had earlier decided (when allowing the defendant's application to re-amend its defence) that the defendant had no prior knowledge of the assignment, the plaintiff could not now suggest otherwise. The plaintiff was also guilty of wrong-doing in the sense it deliberately did not inform the proper party, ie CIMB, that it should take court action against the defendant (see paras 19, 66 & 70).

(4) If the application was allowed, it would negate the whole of the defendant's legal arguments to resist the plaintiff's claim. The defendant's contention was that the plaintiff was on the wrong footing from the start and was incompetent to have brought this action. Therefore, the prejudice that would be caused to the defendant if the application was allowed could not be compensated for with costs. The application, if allowed, would also substantially change the character of the suit from one that inferred that the plaintiff had the authority to sue to one which said the right to sue was actually with CIMB as assignee with the plaintiff as assignor (see paras 73–75).

[Bahasa Malaysia summary

Semasa perbicaraan guaman ini, plaintif memohon bagi kebenaran untuk meminda dan meminda semula penyataan tuntutan terpinda untuk

memasukkan CIMB Investment Bank Bhd ('CIMB') sebagai plaintif bersama atas alasan bahawa plaintif telah menyerahkan hak-haknya untuk membawa tindakan ini kepada CIMB sama ada melalui pajakan atau sebagai penyerahhakan berekuiti. Permohonan ini adalah sebagai respons kepada mahkamah kerana membenarkan defendan meminda semula pembelaannya untuk memplidkan bahawa plaintif secara *ab initio* tidak kompeten untuk memulakan tindakan ini kerana ia telah menyerahkan haknya secara mutlak kepada CIMB. Defendan telah dibenarkan untuk meminda semula pembelaannya atas alasan bahawa ia tidak pernah tahu tentang penyerahhakan plaintif kepada CIMB sehingga saksi tunggal semasa perbicaraan mendedahkan fakta tersebut semasa pemeriksaan balas. Dalam membenarkan permohonan, mahkamah memutuskan bahawa plaintif gagal untuk mengemukakan apa-apa keterangan untuk menunjukkan bahawa ia telah, dalam apa jua cara, memaklumkan defendan terlebih awal mengenai penyerahhakan kepada CIMB. Plaintif menghujahkan bahawa permohonannya sepatutnya dibenarkan melihatkan pada cabaran defendan terhadap locus untuk memulakan dan mengekalkan tindakan; bahawa di bawah A 15 k 6 Kaedah-Kaedah Mahkamah 2012, tindakan boleh diselamatkan sekiranya penggabungan CIMB dibenarkan; bahawa permohonan dibuat secara suci hati tanpa menyalahgunakan proses mahkamah; dan bahawa mahkamah sepatutnya memutuskan sifat penyerahhakan kepada CIMB di akhir perbicaraan. Dalam membantah permohonan, defendan menghujahkan bahawa di bawah surat ikatan penyerahhakan yang relevan, penyerahhakan plaintif kepada CIMB disifatkan sebagai 'mutlak'; oleh itu, plaintif tidak pernah mempunyai hak untuk memulakan tindakan dan dengan itu, tidak mempunyai hak untuk membuat permohonan ini untuk memasukkan CIMB sebagai plaintif bersama. Defendan menyatakan bahawa oleh kerana dapatan mahkamah yang terdahulu, tiada keterangan bahawa defendan tahu tentang penyerahhakan sebelum keterangan saksi plaintif, plaintif diestop daripada menghujahkan sebaliknya. Defendan menghujahkan bahawa permohonan plaintif bukanlah secara suci hati, merupakan penyalahgunaan proses mahkamah dan, sekiranya dibenarkan, akan memprejudiskannya dalam keadaan yang tidak boleh dipampas dengan award kos.

Diputuskan, menolak permohonan:

(1) Plaintif bukan dalam keadaan untuk membuatkan permohonan secara sah kerana ia telah menyerahkan haknya secara mutlak kepada CIMB. Setelah melihat afidavit-afidavit plaintif dalam mempertimbangkan hal-hal keadaan, fakta matriks dan material sedia ada, mahkamah tidak dapat mencari apa-apa keterangan bahawa penyerahhakan adalah tidak mutlak. Ini tidak boleh dielakkan, membawa mahkamah kepada perkataan 'mutlak' yang digunakan dalam klausa 3.1 dokumen penyerahhakan dan pajakan II yang mana termanya bukanlah tidak jelas

mahupun kabur. Dengan ketiadaan keterangan lain, mahkamah tidak mempunyai pilihan tetapi memutuskan bahawa penyerahhakan plaintif kepada CIMB adalah mutlak (lihat perenggan 53–54).

(2) Sekiranya penyerahakkan tidak mutlak, tidak akan ada keperluan untuk memasukkan CIMB sebagai plaintif bersama. Sekiranya penyerahhakan adalah melalui pajakan atau sekiranya ia adalah penyerahhakan berekuiti, plaintif boleh bertindak sendiri dalam menyaman defendan. Diikuti bahawa dapatan mahkamah bahawa plaintif tidak boleh memfailkan dan mendengar permohonan untuk meminda writ atau meminda semula penyata tuntutan kerana hak untuk memohon kepada mahkamah terletak pada CIMB yang menikmati penyerahhakan mutlak (lihat perenggan 55–57).

(3) Permohonan plaintif tidak dibuat secara bersuci hati atau jujur kerana ia tidak mendedahkan fakta terdahulu bahawa hak-haknya telah diserahkan kepada CIMB sehingga benar-benar lambat iaitu apabila satu-satunya saksi plaintif memberi keterangan dalam mahkamah. Oleh kerana mahkamah telah memutuskan terlebih dahulu (dalam membenarkan permohonan defendan untuk meminda semula pembelaannya) bahawa defendan tidak mempunyai pengetahuan terdahulu tentang penyerahhakan, plaintif kini tidak boleh mencadangkan sebaliknya. Plaintif juga bersalah dalam salah laku di mana ia dengan sengaja tidak memaklumkan pihak yang sepatutnya iaitu CIMB bahawa ia sepatutnya mengambil tindakan terhadap defendan (lihat perenggan 19, 66 & 70).

(4) Sekiranya permohonan dibenarkan, ia akan menafikan keseluruhan hujahan-hujahan undang-undang defendan untuk mengelakkan daripada tindakan plaintif. Hujahan plaintif bahawa plaintif bermula dengan langkah yang salah dan tidak kompeten untuk memulakan tindakan ini. Oleh itu, prejudis yang akan disebabkan kepada defendan sekiranya permohonan dibenarkan tidak boleh dipampas dengan kos. Permohonan, sekiranya dibenarkan, akan secara substansial menukar sifat guaman daripada satu yang memberi inferens bahawa plaintif mempunyai autoriti untuk menyaman kepada satu yang mengatakan bahawa hak untuk menyaman adalah dengan CIMB sebagai penerima hak dengan plaintif sebagai penyerah hak (lihat perenggan 73–75).]

Notes

For cases on writ and statement of claim, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 722–726.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)
Fairview Developments Pte Ltd v Ong & Ong Pte Ltd and another appeal [2014] SGCA 5, CA (refd)
Fauziah Khanom bt Irshad Ali Khan v Pegawai Pejabat Pelajaran Daerah Johor Bahru & Ors [2013] 7 MLJ 737, HC (refd)
Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor [1999] 2 MLJ 481; [1999] 2 CLJ 788, CA (refd)
Hipparion (M) Sdn Bhd v Chung Kiaw Bank [1989] 2 MLJ 149, SC (refd)
Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268, FC (distd)
Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor [2002] 2 MLJ 513, FC (refd)
Syarikat Bekalan Air Selangor Sdn Bhd v Selangor State Government (Governement of Malaysia-Third Party) [2014] 7 MLJ 789; [2014] 1 AMR 184, HC (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)
Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd [2008] 3 SLR 1029, CA (refd)

Legislation referred to

Evidence Act 1950 ss 93, 94
Rules of Courts 2012 O 15 r 6, O 15 rr 6(2)(b), (3), 14, O 20 r 5

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Abu Bakar Jais JC:

BACKGROUND

[1] This judgment relates to encl 198 which is a notice of application by the plaintiff for leave to amend the writ and re-amend the amended statement of claim in the midst of trial.

[2] In respect of the writ what is sought to be amended is actually to add another party also as plaintiff. That party is CIMB Investment Bank Bhd ('CIMB').

[3] The plaintiff says there is a need to make CIMB as the co-plaintiff or specifically the second plaintiff now as the defendant in its re-amended defence allowed by this court says that the plaintiff having assigned all its right, benefit and interests to CIMB is not competent to have instituted or maintain the action herein (see the judgment of this court in *Syarikat Bekalan Air Selangor Sdn Bhd v Selangor State Government (Governement of Malaysia-Third Party)* [2014] 7 MLJ 789; [2014] 1 AMR 184).

[4] While the application to re-amend the statement of claim not only concerns what is narrated above but also of relevance specifically to add new paragraphs in the same, namely paras 7A, 7B and 27A.

[5] Paragraph 7A states:

> On 19.1.2005, the first plaintiff assigned its rights, title, benefits and interest (including its right to institute proceedings) under the Concession Agreement to the second plaintiff. The purpose of the said assignment was to secure existing and future borrowings from the second plaintiff. On 19.1.2005, the first plaintiff gave notice of the said assignment and sent a copy thereof to the defendant who acknowledged receipt of the same on 24.1.2005. The defendant at all material times was therefore fully aware of the terms and conditions of the said assignment and the purpose for which it was effected. Despite such actual knowledge, the defendant did not at any time until after of the commencement of the trial of this action contend that the first plaintiff has no title to sue. By reason of its active encouragement as aforesaid it is unjust for the defendant to now contend that the first plaintiff has no standing to bring and maintain this suit.

[6] Paragraph 7B states:

> In any event the first plaintiff, if successful in this suit, will hold all sums that may be awarded by this Honourable Court for and on behalf of the second plaintiff.

[7] While para 27A reads:

> After submission of the Review Document pleaded under paragraph 14 hereof, the defendant appointed the Auditor General of Malaysia as its auditor for the purpose of verifying the claim made by the first plaintiff in the aforesaid document. The Auditor General is and was at all material times, the defendant's agent for the purpose of conducting the verification aforesaid. The Auditor General by his certificate date 26.12.2008 certified, inter alia, that the first plaintiff's Review Document was a true and fair representation and the plaintiff was entitled to a tariff increase of RM1.82/m3. The defendant is accordingly bound by the statements made by the Auditor General in his said certificate. In the event that this Honourable Court disallows the plaintiffs' claim of RM1.89/m3, the plaintiffs are entitled in the alternative to the lesser sum of RM1.82/m3.

[8] There is also application to reflect in the statement of claim that interests may now be allowed at 5%pa as noted by Practice Direction No 1 of 2012 issued by the Chief Justice of Malaysia.

THE PLAINTIFF'S ARGUMENTS

[9] The gist of the plaintiff's submission supporting the application is as follows.

[10] The application is filed pursuant to O 15 r 6 and O 20 r 5 of the Rules of Courts 2012 ('the RC'). Therefore in effect this application can be allowed based on these provisions.

[11] The application is necessary now as the defendant in the re-amended defence questioned the standing of the plaintiff to initiate and maintain this action as it had assigned its rights, benefit and interests to CIMB.

[12] The nature of the assignment whether absolute or equitable requires the joinder of CIMB as the co-plaintiff.

[13] A co-plaintiff could according to the plaintiff now be added since there is allegation that the plaintiff's cause of action is defective.

[14] The purpose of O 15 r 6 of the RC upon which this application is premised is to prevent an action from being defeated merely because of non-joinder of parties.

[15] The legal effect of the assignment should only be determined at the end of the trial without the need to rule on this issue at this stage where merely amendment to the pleadings is being requested.

[16] The plaintiff also says there is no evidence of mala fide or an abuse of the process of the court in this application.

THE DEFENDANT'S ARGUMENTS

[17] Objecting to the application except the re-amendment on interest rate of 5%pa, the defendant's argument is summarised as follows.

[18] There is basis to resist the application now as there is no knowledge on the part of the defendant that the plaintiff's had assigned its right to CIMB until it was disclosed by the only witness of the plaintiff during the course of the trial ie when she was cross-examined in court.

[19] This is also confirmed by this court in its written judgment allowing the re-amendment to the defence when it found only quite late in the day that the defendant knew about the assignment and there were no documents provided by the plaintiff suggesting otherwise.

[20] That judgment by this court is not appealed by the plaintiff meaning the same accepts the findings of facts that there is no evidence the defendant knew about the assignment prior to the plaintiff's witness's testimony as narrated above. In consequence, the defendant says the plaintiff is estopped to revisit the issue.

[21] The assignment by the plaintiff to CIMB is absolute. This is taken from the language of the relevant instrument. Therefore as the assignment is absolute, the plaintiff never had the right to sue or maintain the current action. Since it had no right from the start, it also cannot have the right to bring CIMB as co-plaintiff by this application.

[22] In consequence too the action and application now are abused of process by the plaintiff as at the outset the same had no authority whatsoever to initiate the action and thereafter this application.

[23] Further the application to add CIMB has not satisfied the requirements of O 15 r 14 of the RC as the plaintiff and CIMB cannot bring separate actions and both are not entitled to relief.

[24] Also submitted by the defendant is that this is not an equitable assignment to justify the application.

[25] The application if allowed is prejudicial to the defendant as it would allow the plaintiff to re-start its case knowing full well it had assigned its right including to initiate court actions.

[26] There is also bad faith as the plaintiff must inform the court much earlier that it had assigned its rights. It did not come to court with clean hands having failed to disclose its rights had actually been so assigned to CIMB.

THE COURT'S FINDINGS

[27] First this court needs to remind itself there are actually two separate applications in encl 198. One is amendment to the writ premised on O 15 r 6 of the RC and the other is re-amendment of the amended statement of claim premised on O 20 r 5 of the RC, although it is recognised one could conclusively argue that the latter provision do also indicates it applies also for amendment of writ as it states:

> ... the court may at any stage of the proceedings allow the *Plaintiff to amend his writ* or any party to amend his pleading on such terms as to costs or otherwise as may be just and in such manner, if any, as it may direct. (Emphasis added.)

[28] Second, another reminder pertinent for this court is that both applications are made and filed by the plaintiff and in the case of the amendment to the writ it is not made by CIMB although the same could make the application by virtue of O 15 r 6(2)(b) of the RC which states:

> Subject to this rule, at any stage of the proceedings in any cause or matter, the Court may on such terms as it thinks just and either of its own motion or on application order any of the following persons to be added as a party, namely:
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> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or
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> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the Court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

[29] Arguably that provisions alone cannot clearly show that CIMB has that ability to apply in this case to be added as a party. However when one further takes into account the provision of O 15 r 6(3) of the RC, it will clearly illustrates CIMB could make the application if they wanted. This provision states:

> *An application by any person for an order under para (2) adding him as a party* shall, except with the leave of the Court, be supported by an affidavit showing his interest in the matters in dispute in the cause or matter or, as the case may be, the question or issue to be determined as between him and any party to the cause or matter. (Emphasis added.)

[30] This is explained as the thrust of the arguments opposing encl 198 is among others that the plaintiff has no capacity to forward this application in the first place. This is also elaborated as the standing of the plaintiff for the purpose of this judgment is also an issue most relevant to be considered.

[31] However at this stage it is most convenient for this court to deal with the application of re-amendment of the amended statement of claim first before setting its mind on the amendment of writ to add or join CIMB as co-plaintiff.

[32] As stated there is already a related judgment by this court in *Syarikat Bekalan Air Selangor Sdn Bhd* when the re-amendment to the defence was

allowed for the defendant to raise in the defence that the plaintiff had no locus standi to file and maintain the action as its rights had been assigned to CIMB.

[33] In that judgment this court had explained the significance of the Federal Court's judgment in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 on the law pertaining to amendments of pleadings. That judgment by the Federal Court is the leading authority on the subject and in the present application before this court, even the plaintiff cited this case in its submission. Therefore there is no reason for this court now not to adopt the same principles in *Yamaha Motor* as it had done so when the defendant applied for re-amendments of its defence. As a matter of fact, this court will go further to say that this application now can be effectively determined by answering the questions posed to the principles laid down in *Yamaha Motor*.

[34] As explained in *Syarikat Bekalan Air* the first principle of *Yamaha Motor* is that the amendments proposed must be made bona fide. Therefore the question that needs to be asked is these amendments requested bona fide? Before determining whether the amendments sought by the plaintiff is bona fide, it is instructive to ask in the first place what is bona fide. Though the defendant objects to the plaintiff's application saying it is not bona fide there has not been an attempt by the defendant to explain what this term means presumably because the meaning should be plainly obvious. Nonetheless this court feels that this term should be clearly understood in order to fairly and effectively answer the first principle in *Yamaha Motor* and for this court to always remind itself to ask, do the facts of the present case support the plaintiff's assertion that the application for amendments are indeed bona fide.

[35] In this regard, this court finds the explanation in *Fauziah Khanom bt Irshad Ali Khan v Pegawai Pejabat Pelajaran Daerah Johor Bahru & Ors* [2013] 7 MLJ 737 is most appropriate where it states:

> Bona fide is defined to mean 'in good faith,honestly, without fraud, collusion or participation in wrongdoing' (*Osborn's Concise Law Dictionary* (8th Ed), Sweet and Maxwell).

[36] Though that explanation is simply taken from a legal dictionary, this court nevertheless will always be guided by it to judge whether the assertion that this application is bona fide can be accepted. Following the above decision too, this court finds in the context of the present application, the elements most relevant would be whether the amendments requested is in good faith and honestly made or even whether the plaintiff is not involved in wrongdoing leading to this application.

[37] On this issue it is most relevant to note the contentions of both parties on the assignment for the benefit of CIMB. This issue on assignment as will be

shown relates also to the fact whether the application is bona fide. If it is absolute assignment it generally mean that this application cannot stand as the plaintiff has no rights to take make this application now. That is why the plaintiff contends this is not an absolute assignment but only assignment by way of charge or equitable assignment.

[38] In this regard there is no dispute that cl 3.1 of the assignment and charge II, the instrument governing the assignment between the plaintiff and CIMB states the assignment is absolute. That clause states:

> SYABAS as beneficial owner hereby assigns and agrees to assign absolutely to the Security Agent as security for the payment and repayment in full of the Secured Amounts all its present and future rights, title, benefits and interest in and to the Charged Assets, including the right to pursue any action, proceeding, suit or arbitration arising in relation to any of the rights assigned to the Security Agent pursuant to this Clause 3.1 and to enforce such rights in the name of the Security Agent or of SYABAS. For the avoidance of doubt, the Security Agent and/or the Secured Parties shall only be entitled to residual benefits and interests in the Performance Bonds after the rights of the State Government of Selangor.

[39] As this is clearly stated, can this court deduce that the assignment actually is an absolute assignment contrary to the plaintiff's submission? ln this regard this court say it can just by looking at the words of the above clause. As the word 'absolutely' is used in that clause this court is at liberty to say the assignment to CIMB by the plaintiff is actually an absolute assignment.

[40] This approach is taken by no less than the Supreme Court in *Hipparion (M) Sdn Bhd v Chung Kiaw Bank* [1989] 2 MLJ 149 where after considering the provision of the relevant deed it is said;

> The deed clearly purports and is intended in point of form to be an absolute assignment because of the use of the word 'absolutely'. The intention of the parties clearly was that it should be absolute in the sense that the assignee should have all the rights, title and interest of the assignor in the sale and purchase agreement.

[41] Further the nature of the assignment whether absolute or by way of charge is to be determined within the confines of the relevant agreement, in this case only by looking at assignment and charge II signed and agreed by plaintiff and CIMB.

[42] This court draws support for the above proposition from both Federal Court's decisions in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 and *Phileoallied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor* [2002] 2 MLJ 513.

[43] However having said that, this court is also aware of the subsequent

Federal's Court decision in *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 where it states;

> Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines. First, a court interpreting a private contract is not confined to the four corners of document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract. See, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98. As Lord Clyde said in *Bank of Credit and Commerce International SA v Munawar Ali* [2001] 2 WLR 735:
>
> The knowledge reasonably available to them (that is to say the parties to the contract) must include matters of law as well as matters of fact. The problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. The parties may well have never applied their minds to the particular eventuality which has subsequently arisen, so that they may never in fact have had any conscious intention in relation to that eventuality. It is an objective approach which is required and a solution should be found which is both reasonable and realistic. The meaning of the agreement is to be discovered from the words which they have used in the context of the circumstances in which they made the agreement. The exercise is not one where there are strict rules, but one where the solution is to be found by considering the language by the parties against the background of the surrounding circumstances.

[44] The basic principle therefore according to this case is that written contracts must not be construed just by relying on the wordings of the same but must also take into account the surrounding circumstances between the parties to the agreement leading up to the same being signed.

[45] In the context of the present case before this court, *Berjaya Times Square* has the effect of saying it would be wrong for this court to merely look at the word 'absolutely' in the assignment and charge II signed and agreed by plaintiff and CIMB to conclude the assignment is absolute. In fact it is ruled in this case that *Nouvau Mont* is no longer good law. There is a further duty for this court to bear in mind the factual matrix of the whole case pertaining to the agreement including considering all material available between the parties before it can fairly be decided that the assignment is indeed an absolute one.

[46] Related to this, the plaintiff had also pointed out the Singapore's Court of Appeal's decision in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 In this case Andrew Phang Boon Leong JA and VK Rajah JA formed part of the coram but it was the latter

who delivered the judgment. What was sought by the plaintiff in this judgment is to show that despite clear and unambiguous wordings of a contract, extrinsic evidence could be admitted to show what really ought to be the conclusive interpretation of the wordings and intention of the parties to the contract. The effect being in relation to the present case before this court is that word 'absolutely' though clear still needs the scrutiny of extrinsic evidence which might suggest it does not necessarily lead to the conclusion that it is an absolute assignment.

[47] The relevant passage appears at p 1096 of the judgment of the case and it reads:

> To summarise, the approach adopted in Singapore to the admissibility of extrinsic evidence to effect written contracts is a pragmatic and principled one. The main features of this approach are as follows:
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> (a) A court should take into account the essence and attributes of the document being examined. The court's treatment of extrinsic evidence at various stages of the analytical process may differ depending on the nature of the document. In general, the court ought to be more reluctant to allow extrinsic evidence to affect standard form contracts and commercial documents;
>
> (b) If the court is satisfied that the parties intended to embody their entire agreement in a written contract, no extrinsic evidence is admissible to contradict, vary add to, or subtract from its terms (see ss 93-ss 94 of the Evidence Act). In determining whether the parties so intended, our courts may look at extrinsic evidence and apply the normal objective test, subject to a rebuttable presumption that a contract which is complete on its face was intended to contain all the terms of the parties' agreement. In other words, where a contract is complete on its face, the language of the contract constitutes prima facie proof of the parties' intentions;
>
> (c) Extrinsic evidence is admissible under proviso (f) to s 94 to aid in the interpretation of the written words. Our courts now adopt, via this proviso, the modern contextual approach to interpretation, in line with the developments in England in this area of the law to date. Crucially, ambiguity is not a prerequisite for the admissibility of extrinsic evidence under proviso (f) to s 94;
>
> (d) The extrinsic evidence in question is admissible so long as it is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context. However, the principle of objectively ascertaining contractual intention(s) remains paramount. Thus, the extrinsic evidence must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. Further, where extrinsic evidence in the form of prior negotiations and subsequent conduct is concerned, we find the views expressed in McMeel's article (supra) and Nicholls' article (supra) persuasive. For the reason, there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent

conduct, although, in the normal case, such evidence is likely to be inadmissible for non-compliance with the requirements set out above. (We should add that the relevance of subsequence conduct remains a controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture). Declarations of subjective intent remain inadmissible except for the purpose of giving meaning to terms which have been determined to be latently ambiguous;

(e) In some cases, the extrinsic evidence in question leads to possible alternative interpretations of the written words (ie, the court determines that latent ambiguity exist). A court may give effect to these alternative interpretations, always bearing in mind s 94 of the Evidence Act. In arriving at the ultimate interpretation of the words to be construed, the court may take into account subjective declarations of intent. Furthermore, the normal canons of interpretation apply in conjunction with the relevant provisions of the Evidence Act, ie, ss 95-100;

(f) A court should always be careful to ensure that extrinsic evidence is used to explain and illuminate the written words, and not to contradict or vary them. Where the court concludes that the parties have used the wrongs words, rectification may be a more appropriate remedy.

[48] In response to the above case, the defendant submitted a more recent decision also of the Singapore's Court of Appeal in *Fairview Developments Pte Ltd v Ong & Ong Pte Ltd and another appeal* [2014] SGCA 5 where again Andrew Phang Boon Leong JA and VK Rajah JA were also in the coram but this time it was the former who delivered the judgment where it was said:

> First, when the text and the context of the express terms of a contract clearly express the intention of the parties, the court ought to give effect to that intention.

[49] Therefore in the context specifically on the word 'absolutely' in the present case before this court, the relevant central theme regarding the above two decision of the same court ie Singapore's Court of Appeal where the coram comprises the same learned two judges is still there must be determination whether the word 'absolutely' is unambiguous and clear to denote the intention of the plaintiff.

[50] There is no reason for this court to say the word 'absolutely' is vague and ambiguous. At first blush the language here is clear to denote the intentions of the parties and there is no reason to admit extrinsic evidence to explain further what is intended by the use of that word or the words of the agreement in entirety.

[51] However not only as abundance of caution but as a duty this court need to ask itself what are the facts or circumstances favouring the plaintiff beyond the wordings of the instrument ie assignment and charge II to say this is not an absolute assignment.

[52] Of course the first point of reference is the affidavits of the plaintiff to see whether there are assertions the assignment is not absolute. In this regard it is most unfortunate this court is unable to find assertions of facts that the assignment is not absolute in the affidavits of the plaintiff. The most that is said by the plaintiff are:

(a) the defendant is in full knowledge of the assignment to CIMB (paras 6 and 3 of the plaintiff's affidavit dated 31 October 2013 and 16 December 2013 respectively);

(b) the issue as to what is the nature of the assignment is only to be decided at the end of trial (para 15 of the plaintiff's affidavit dated 25 November 2013).

[53] Hence having viewed the plaintiff's affidavits in considering the surrounding circumstances, the factual matrix and the material available, this court still with respect could not find evidence this is not an absolute assignment.

[54] That leaves this court inevitably back to the word 'absolutely' in cl 3.1 of the assignment and charge II. This court therefore in the absence of other evidence, has no option but to rule that this is an absolute assignment by the plaintiff to CIMB having regard to the said clause.

[55] This court also agrees with the contention of the defendant this must be an absolute assignment otherwise there would not be any need to add CIMB as co-plaintiff. Had this been an assignment by way of charge only or equitable assignment, the plaintiff could very well stand alone in suing the defendant.

[56] Having decided the assignment is absolute in nature, this court cannot rule that the assignment is only by way of charge or it is an equitable assignment.

[57] Also having determined this is an absolute assignment is there a necessity to consider further whether in any event this re-amendments requested are bona fide. That question must be answered in the negative as it is no longer relevant to decide whether the plaintiff is bona fide in its application to re-amend the amended statement of claim. This is simply because the plaintiff cannot file and be heard on this application as that rights to move this

court is now with CIMB who enjoys the absolute assignment. In that sense it matters not whether the application now is bona fide or otherwise.

[58] However again nonetheless out of caution assuming this court is wrong not to consider this issue, was the plaintiff bona fide in its application. On this note *Fauziah Khanom* becomes relevant firstly to see whether there is good faith on the part of the plaintiff in its application.

[59] With respect there is in the view of this court a lack of good faith in the plaintiff for its application because it was never disclosed that CIMB actually holds the assignment until it was extremely late ie only when its sole witness testified in court.

[60] In the opinion of this court the plaintiff too could not sustain the contention the defendant is prevented from mounting a genuine complaint that it had no knowledge about the assignment to CIMB as this court in *Syarikat Bekalan Air* found indeed the defendant was not aware of the same.

[61] The relevant passage of that judgment reads:

> ... the assertion by the plaintiff that the defendant knew all the while or could have known that the assignment was for CIMB is incorrect as the documents referred to by the plaintiff do not reflect the same.
>
> Likewise nowhere in the documents including the minutes of the plaintiff's BOD's meetings, referred to by the plaintiff, could this court see that the assignment was indeed made by the plaintiff in favour of CIMB.

[62] The plaintiff did not appeal against the decision in *Syarikat Bekalan Air* and therefore is deemed to agree and accept the findings of facts narrated above.

[63] On this note too, the defendant says that by not appealing the plaintiff is estopped from raising the issue again on the knowledge of the defendant with regard to the assignment to CIMB and supports this contention with the Supreme Court's decision in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 and the Court of Appeal decision in *Hartela Contractors Ltd v Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481; [1999] 2 CLJ 788.

[64] On this point suffice for this court to say that since it has been decided that the defendant had no knowledge in the assignment until late in the day, the plaintiff cannot in any manner now in the absence of new material in this application suggest that the defendant actually knew of the said assignment.

[65] That brings this court too the second element in *Fauziah Khanom* ie

whether this application is honestly made.

[66] In this regard with respect this court finds the application cannot be said to be honestly made as the plaintiff had chosen not to reveal earlier that its rights had been assigned to CIMB and in this regard it was CIMB that should have taken court actions for the claim.

[67] The third element relevant in determining bona fide as found in *Fauziah Khanom* in the context of the present case is whether plaintiff is involve in wrongdoing leading to this application.

[68] First the word 'wrongdoing' could connote something deplorable or something that ought to be despised. Those are too strong a term to be used against the plaintiff in its application. That is not how this court perceived the conduct of the plaintiff here in this application. What the court is saying here is the conduct of the plaintiff merely amounts to wrongdoing as it is improper for this application to be forwarded simply because CIMB was not disclosed earlier as having the assignment as CIMB should be the party taking action.

[69] The question to be asked is why CIMB did not pursue this action knowing full well it had been assigned the rights of the plaintiff including initiating any court actions. In order to be generous this court would say one reason it did not do so is because it did not know or realise it is presented with this opportunity to sue the defendant.

[70] But that begs the question why didn't the plaintiff inform CIMB it is in a position to proceed legally against the defendant. There is no answer to this question if the affidavits of the plaintiff are to be taken into account. Therefore this is also considered by this court as another aspect of wrongdoing by the plaintiff. Wrongdoing in the sense of deliberately not informing the proper party ie CIMB that it should take court action against the defendant or the very least asking CIMB's permission that it take action also on behalf of CIMB.

[71] The plaintiff can raise its hands and vehemently protest saying CIMB was not informed as it was thought that the plaintiff could bring the action without CIMB being made a party. Obviously if that is the answer, the plaintiff is plainly wrong as demonstrated by its own application now for the addition or joinder of CIMB as co-plaintiff.

[72] Hence considering the relevant three factors as pointed above in *Fauziah Khanom* for bona fide, this court is of the considered view that bona fide, the first principle of *Yamaha Motor* is not satisfied by the plaintiff.

[73] The second principle in *Yamaha Motor* is whether the prejudice caused in this case to the defendant could be compensated with costs if the re-amendment is allowed.

[74] Here this court says the prejudice caused cannot be compensated with costs as the issue of bringing CIMB both for the amendment to the writ and re-amendment to the statement of claim involves legal argument that affords the defendant basis to resist the claim by the plaintiff. The defendant in that sense is entitled to contest in whatever manner the legality of the suit. In this case as it stands the defendant submits the plaintiff is on the wrong footing from the start as it cannot bring this action. Therefore it is the finding of this court that the prejudice caused cannot be compensated with cost as if the re-amendment is allowed that will negate the whole arguments of the defendant and no costs can compensate that loss of the defendant.

[75] On the third principle of *Yamaha Motor* this court has to determine whether the character of the suit would be changed to another and inconsistent character if the re-amendment is allowed. On this, obviously the character of the suit would be substantially changed as previously the plaintiff by the statement of claim inferred that it has the authority to sue but if the re-amendment is allowed it changes the whole complexion of the pleading as it has the effect of saying actually the right to take action is on CIMB as assignee together with plaintiff as assignor.

[76] Therefore this court say respectfully the plaintiff based on the foregoing had failed to fulfil the three principles as explained in *Yamaha Motor*.

[77] In this regard it ought to be stressed that this finding applies for all the re-amendment to the amended statement of claim sought including re-amendment on interest rate of 5% as well as the addition of the proposed para 27A to the re-amended statement of claim on the plaintiff's entitlement on tariff increase.

[78] This is explained as the defendant quite wrongly had indicated firstly it do not object to the re-amendment on interest rate and secondly had submitted that as for the proposed para 27A that could be dealt at a later stage depending on the outcome of this application.

[79] The defendant with respect had been erroneous on these points as if the locus standi of the plaintiff is an issue against the same as found in this judgment as well as contended by the defendant itself, surely the re-amendment sought on those two points can never be allowed, no matter conceded or at a later stage.

[80] That brings this court to the amendment on the writ to add CIMB as co-plaintiff.

[81] As this court had already found the filling of the application itself is the prerogative of CIMB who enjoys the absolute assignment, this court says the application for amendment of the writ cannot be moved by the plaintiff.

[82] If at all the amendment to the writ is to be made, this ought in the opinion of this court be requested by CIMB who after all is in a position to ask that it be added as a party as seen in the provisions of O 15 r 6(2)(b) and (3) of the RC alluded to earlier.

[83] In conclusion the amendments requested by the plaintiff for the writ and the re-amendments for the re-amended statement of claim cannot be allowed as the assignment is absolute for the benefit of CIMB and therefore the plaintiff is not in a position legally to make this application.

[84] Enclosure 198 is therefore dismissed with costs of RM5,000 only to the defendant as the third party had indicated it merely leaves it to this court for the decision of this application.

Application dismissed.

Reported by Ashok Kumar